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No. 02-891

In the Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND, PETITIONER

v.

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The "anti-cutback" rule in Section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1054(g), generally prohibits any amendment of a qualified pension plan that has the effect of eliminating or reducing an early retirement benefit attributable to services provided by a participant before the amendment.

The question presented is whether an amendment to a multiemployer pension plan that provides for the suspension of the payment of early retirement benefits during periods that a participant, after retiring, is again employed in the same industry is a prohibited elimination or reduction of benefits when applied to employees who retired before adoption of the amendment.

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Cases—Continued: Page

Washington State Dep't of Soc. & Health Servs. v. *Guardianship Estate of Keffeler*, 537 U.S. 371 (2003) 27

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29 U.S.C. 1053(a)(3)(C) 12
29 U.S.C. 1053(a)(3)(D) 12
29 U.S.C. 1053(a)(3)(E)(ii) 13
29 U.S.C. 1053(a)(3)(F) 12
29 U.S.C. 1053(c)(1)(A) 20
29 U.S.C. 1053(c)(1)(B) 20
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29 U.S.C. 1054(b)(1) 10
29 U.S.C. 1054(g) (§ 204(g)) ..... *passim*
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29 U.S.C. 1083(b)(4) 28
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Tit. IV, 88 Stat. 1003 (29 U.S.C. 1301 *et seq.*):
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Reorg. Plan No. 4 of 1978, § 101, 92 Stat. 3790 ..... 1, 2, 24

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130 Cong. Rec. (1984):
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p. 23,488 22

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Defined Benefit Listing of Required Modifications and Information Package:
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(1987) 26
(2000) <http://www.irs.gov/pub/irs-tege/db_lrm.pdf> 25-26
42 Fed. Reg. (1977):
p. 42,318 23
p. 42,339 23
53 Fed. Reg. (1988):
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p. 26,053 23
65 Fed. Reg. (2000):
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p. 53,902 23
H.R. Rep. No. 655, 98th Cong., 2d Sess. (1984) 21
IR-82-139, 1982 WL 210486 (Dec. 3, 1982) 24
I.R.S. Notice 82-23, 1982-2 C.B. 752 ..... 19, 24
John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* (3d ed. 2000) 10, 11, 21
Multiemployer Plan Examination Guidelines (2001) (available at WESTLAW, RIA-IRM database) 8, 26, 27
1 Richard J. Pierce, Jr., *Administrative Law Treatise* (4th ed. 2002) 27
Rev. Rul. 81-140, 1981-1 C.B. 180 24
S. Rep. No. 575, 98th Cong., 2d Sess. (1984) 21
3 Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976) 15, 16
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INTEREST OF THE UNITED STATES

This case presents the question whether an amendment to a multiemployer pension plan that permits the plan to suspend payment of early retirement benefits during periods that a retired participant is again employed in the same industry constitutes a reduction of benefits prohibited by Section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1054(g). With certain exceptions, the Secretary of the Treasury has authority to interpret and administer the provisions of Title I of ERISA relating to the vesting and accrual of benefits under qualified pension plans, as well as the corresponding provisions of Title II of ERISA relating to the qualification of pension plans for favorable tax treatment. See Reorg. Plan No. 4 of 1978, § 101, 92 Stat. 3790. That authority encompasses both

Section 204(g) of ERISA and its counterpart in the Internal Revenue Code (Code), 26 U.S.C. 411(d)(6), which imposes identical requirements. The Secretary of Labor has more general authority to interpret and administer Title I of ERISA, including Section 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B), and its Code counterpart, 26 U.S.C. 411(a)(3)(B), which govern the suspension of benefit payments during periods in which retired participants are reemployed in certain capacities. See 92 Stat. 3790. The United States filed an amicus curiae brief in this case at the petition stage in response to this Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1054(g), provides that an amendment to a pension plan may not decrease the "accrued benefit" of a pension plan participant, and further provides that a plan amendment that has the effect of "eliminating or reducing" an early retirement benefit attributable to service before the amendment shall be treated as a prohibited decrease of accrued benefits. 29 U.S.C. 1054(g)(1) and (2). A separate provision of ERISA, Section 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B), authorizes a multiemployer pension plan to provide for the suspension of the payment of benefits to retirees during periods in which they are employed in the same industry, trade or craft, and geographic area covered by the plan. This case presents the question whether an amendment to a multiemployer pension plan that permits the plan to suspend payment of early retirement benefits during periods that a participant, after retiring, is again employed in the same industry constitutes a prohibited reduction of the benefits themselves under Section 204(g). In the judgment of the United States, amendments permitting such suspensions or expanding the

scope of employment triggering such suspensions may be applied to current retirees without violating Section 204(g). The language and structure of ERISA show that Congress distinguished between temporary suspension of benefit *payments* authorized by Section 203(a)(3)(B) and reductions in the accrued *benefits* themselves (that is, the participant's entitlement under a plan, ordinarily based on his years of service and compensation history and ordinarily expressed as a defined periodic payment at normal retirement age). Accordingly, a suspension of benefit payments permitted by Section 203(a)(3)(B) does not reduce a participant's accrued benefits under the plan. A plan amendment that permits such a suspension or expands the scope of employment that will trigger a suspension likewise does not constitute a prohibited reduction in benefits.

1. Respondents are participants in a multiemployer defined benefit pension plan that is administered by petitioner Central Laborers' Pension Fund. Respondents retired in 1996, when they were each 39 years old. Upon retirement, they began receiving monthly benefit payments under a so-called "service only" pension (*i.e.*, a pension supplying benefits calculated only on their length of service and supported entirely by employer contributions). Those payments were available to plan participants who retired at any age, so long as they had earned a threshold number of pension credits. Under the plan, the monthly early retirement benefit payments were the same as the payments available at normal retirement age. Thus, the pension provided a "subsidized" retirement benefit, in that payments were not actuarially reduced to take into account the fact that payments began earlier and would likely continue over a longer period. Pet. App. 4a. Under the plan, monthly benefit payments for persons who retire before age 60 are suspended during periods when the retirees thereafter work in certain "disqualifying employment." At the time respon-

dents retired, the plan defined "disqualifying employment" as employment "in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker)." *Ibid.*

After their retirement, respondents obtained jobs as supervisors in the construction industry. That type of employment was not then "disqualifying employment" under the plan, and respondents therefore continued to receive their monthly payments. Two years after respondents retired, the plan was amended to expand the definition of "disqualifying employment" to include (for participants who retire before age 53) work "in any capacity in the construction industry (either as a union or non-union construction worker)." Pet. App. 5a. The plan construed the amended definition of "disqualifying employment" to encompass the supervisory work performed by respondents. Accordingly, after providing respondents notice, the plan suspended their monthly benefit payments. *Ibid.*

2. Respondents brought this action against the plan under Section 502 of ERISA, 29 U.S.C. 1132, to obtain payment of the suspended benefits. Respondents claimed that the plan amendment defining "disqualifying employment" to include supervisory work violates Section 204(g) of ERISA, 29 U.S.C. 1054(g), by "reducing an early retirement benefit." 29 U.S.C. 1054(g)(2)(A); 26 U.S.C. 411(d)(6)(B)(i).

The district court ruled in favor of the plan. Pet. App. 33a-45a. Relying on *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283 (5th Cir. 1998), the court held hat the amendment to the plan did not violate Section 204(g) because it involved a "suspension of benefit payments" expressly authorized by ERISA rather than a prohibited "reduction of benefits." Pet. App. 37a-38a. The court explained that, "unlike a reduction in benefits situation, * * *

the suspension is temporary in nature and completely under the control of the retirees who can avoid or terminate suspension of benefit payments by declining or terminating disqualifying employment."[1] *Id.* at 38a.

3. A divided panel of the court of appeals reversed. Pet. App. 3a-31a. The court recognized that the "suspension" of benefit payments during respondents' employment as supervisors was only temporary under the plan (*ibid.*), and acknowledged that suspension under "a pre-existing plan provision * * * would not decrease accrued benefits." *Id.* at 20a; accord *id.* at 14a n.10. The majority nevertheless concluded that the amendment permitting suspension of benefit payments effected a permanent "reduction" of respondents' total early retirement benefits because respondents would "never recover[] the payments lost during the employment period." *Id.* at 10a. The majority also noted that respondents had "lost * * * the right to continue to work in the industry while receiving monthly benefit payments" (*ibid.*), and suggested that the loss of that right also "was a reduction of early retirement benefits within the plain meaning of [Section 204(g)(2)]." *Ibid.*

Judge Cudahy dissented. Pet. App. 24a-31a. He concluded that an amendment permitting "suspension" of benefit payments authorized by Section 203(a)(3)(B) does not violate Section 204(g)'s prohibition on the "reduction" of benefits (*id.* at 24a-26a), finding that conclusion to be "firmly support[ed]" (*id.* at 26a) by the legislative history of Section 204(g)(2) and administrative interpretations of ERISA's benefit accrual provisions. Judge Cudahy also reasoned that "the broadening of the ban on 'double dipping'"—drawing a pension funded by the construction industry while still

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[1] The district court also rejected respondents' contention that petitioner acted arbitrarily and capriciously by construing the amended definition of "disqualifying employment" to encompass supervisory work. Pet. App. 38a-45a. That issue is not before the Court.

working in that industry—"seems not inequitable," *id.* at 25a, because "the suspension of pension payments does not reduce the recipient's current income because the temporarily lost pension income is replaced by earned income * * * from the very same construction industry." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals erred in holding that Section 204(g) of ERISA prohibits applying to current retirees (and existing benefit accruals) a plan amendment that expands the types of post-retirement employment that trigger temporary suspension of early retirement benefit payments.

The language and structure of ERISA show that Congress did not consider the temporary suspension of benefit payments authorized by Section 203(a)(3)(B) to constitute a "reduc[tion]" in benefits. It follows from that conclusion that a plan amendment permitting the suspension of benefit payments under Section 203(a)(3)(B) likewise would not result in a reduction of benefits prohibited by Section 204(g). ERISA consistently distinguishes between a "reduction of benefits" and an authorized "suspension of benefit *payments*." In this case, that distinction reflects the particular purpose served by the suspension of benefit payments during disqualifying reemployment under Section 203(a)(3)(B). Congress expressly authorized plans to suspend benefit payments during periods of reemployment for the purpose of preventing participants from engaging in "double-dipping" through post-retirement employment in the same industry, so that current employees will not be required to fund the benefits of retirees while competing against them for wages, and to avoid the diversion of plan resources from those who have fully retired to those who continue to earn income by working. Such suspensions do not constitute reductions in benefits because, unlike reductions, they are by definition temporary, and they do not affect the "defined level of benefits" (*Hughes*

Aircraft Co. v. *Jacobson*, 525 U.S. 432, 440 (1999)) to which a participant is entitled under the plan. As soon as respondents cease disqualifying employment, their pension payments will resume at precisely the same defined level as before. In addition, Congress provided that although such suspensions result in the permanent loss of individual payments during the months an employee is engaged in disqualifying employment, the suspension does not effect a prohibited forfeiture of the participant's "right to an accrued benefit." 29 U.S.C. 1053(a)(3)(B). As the Fifth Circuit properly concluded, "an amendment authorizing such a suspension does not serve to decrease a participant's accrued benefits, and thus cannot violate [Section 204(g)]." *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283, 291 (1998).

The legislative history of the Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426, which made clear that Section 204(g) applies to early retirement benefits, confirms that understanding. To begin with, REA was designed simply to clarify that Section 204(g) applies to both normal retirement benefits and early retirement benefits, and did not change the basic meaning of the word "benefit." Because an amendment expanding the types of disqualifying employment under a suspension provision consistent with Section 203(a)(3)(B) would not violate the anti-cutback rule if it were applied to suspend fully accrued normal retirement benefits, it would not violate the rule if similarly applied to early retirement benefits. In addition, the principal House sponsor of the legislation explicitly stated that it would in no way affect suspension of benefit payments under Section 203(a)(3)(B).

Two decades of regulatory practice support the conclusion that application of amended suspension-of-payment provisions to current retirees and existing accruals does not violate the anti-cutback rule. Regulations issued by the Department of the Treasury have long provided that plans

need not adjust the accrued benefit of participants to account for suspensions of payments under Section 203(a)(3)(B), because ERISA deems that the withholding of such benefit payments does not effect a prohibited forfeiture of those accrued benefits. In addition, Internal Revenue Service (Service) documents published as sample plan language for employers since at least 1984 have said that plan sponsors may adopt amendments that introduce suspension provisions, without indicating that such amendments must be limited to benefits accruing in the future. Consistent with those documents, the Service has routinely approved such plan amendments. The Service recently incorporated that view into the Internal Revenue Manual, which explicitly provides that an amendment that suspends benefit payments "on account of [Section] 203(a)(3)(B) service does not violate [the anti-cutback rule]." Multiemployer Plan Examination Guidelines 4.72.14.3.5.3(7) (2001) (available on WESTLAW, RIA-IRM database).

Finally, the court of appeals' rule would disadvantage plan participants, by diverting plan resources from those who have fully retired, by requiring current employees to continue to fund the benefits of early retirees while competing with them for wages, and by giving plans the incentive to adopt and retain the most stringent disqualifying employment provisions. The court of appeals' rule also would impose significant administrative burdens on plan administrators by requiring them to track which suspension provisions apply to which accruals.

ARGUMENT

AN AMENDMENT TO A MULTIEMPLOYER PENSION PLAN THAT EXPANDS THE TYPES OF POST-RETIREMENT EMPLOYMENT THAT TRIGGER SUSPENSION OF BENEFIT PAYMENTS WITHIN THE LIMITS PERMITTED BY ERISA SECTION 203(a)(3)(B) MAY BE APPLIED TO PARTICIPANTS WHO RETIRED BEFORE THE AMENDMENT WITHOUT VIOLATING SECTION 204(g)(2)

A. The Text And Structure Of ERISA Establish That A Plan May Apply Amended Suspension Provisions To Current Retirees Without "Reducing" Benefits In Violation Of Section 204(g)

The court of appeals held that "a pension plan amendment which expands the types of post-retirement employment that trigger mandatory suspension of early retirement benefits violates ERISA's 'anti-cutback' rule * * * when applied to" persons who retired before the date of the amendment. Pet. App. 3a. Indeed, the court indicated that its holding extended to the suspension of benefits that are attributable to service before the date of the amendment, even if the participant had not yet retired at the time of the amendment. *Id.* at 10a n.6. The court reached those conclusions based on its understanding of the "plain meaning" of Section 204(g)'s prohibition on "reducing a[] * * * benefit" (29 U.S.C. 1054(g)(2)), viewing the provision in isolation. See Pet. App. 7a- 10a. The court failed to consider Section 204(g) within the context of the "comprehensive and reticulated" (*Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 209 (2001)) scheme enacted by Congress. See generally *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall

statutory scheme."). While the court of appeals' interpretation of Section 204(g) "might be plausible were [this Court] to interpret that provision in isolation, * * * it simply is not tenable in light of [ERISA's] surrounding provisions." *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) (opinion of O'Connor, J.). Read in context, Section 204(g) does not prohibit application of amended suspension-of-payment provisions to participants who have already retired or to the benefits of future retirees attributable to service before the amendment.

1. ERISA prescribes distinct rules governing the accrual and vesting of pension benefits, which operate to "assur[e] that employees obtain rights to at least portions of their normal pension benefits even if they leave their positions prior to retirement." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981).

a. ERISA's benefit-accrual rules, set forth in Section 204 of the Act, 29 U.S.C. 1054, set minimum requirements for the rate at which plan participants earn benefits, essentially to ensure that accrual is not so "backloaded" (delayed) as to make the nominal legal right under a plan to a pension of little value because limited or no benefits have actually accrued by the time the participant retires. See generally John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 153-154 (3d ed. 2000). Section 204(b) requires that defined benefit plans satisfy one of three alternative minimum benefit-accrual formulas. See 29 U.S.C. 1054(b)(1); see also 26 U.S.C. 411(b)(1).[2] Section 204(g), at issue here,

[2] Title II of ERISA amended various provisions of the Internal Revenue Code involving the qualification of pension plans for special tax treatment in order to conform those provisions to the substantive requirements established by Title I of ERISA. The Internal Revenue Code thus contains counterparts to many provisions of Title I of ERISA, including both Sections 203 and 204. See generally *Pension and Employee Benefit Law*, *supra*, at 91 (noting that tax provisions contained in "Title II of ERISA[] tend[] to duplicate the substantive regulation of ERISA's [Title I] on such matters as funding and vesting"); *id.* at 235-237 (listing Code sections that are counterparts to ERISA Title I provisions).

provides that the benefits a participant has accrued in the pension plan may not be decreased by an amendment to the plan. As revised by the Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, § 301(a), 98 Stat. 1451, Section 204(g) further provides that a plan amendment that has the effect of eliminating or reducing an early retirement benefit attributable to service before the amendment "shall be treated as reducing accrued benefits." 29 U.S.C. 1054(g)(2); see also 26 U.S.C. 411(d)(6).

b. ERISA also prescribes minimum requirements for the "doctrinally distinct" (*Pension and Employee Benefit Law*, *supra*, at 122) subject of the vesting of benefits. ERISA's vesting rules, set forth in Section 203 of the Act, 29 U.S.C. 1053, govern the time in which an employee's claim to accrued benefits becomes "nonforfeitable," meaning "unconditional" and "legally enforceable against the plan." 29 U.S.C. 1002(19). ERISA's vesting rules thereby prevent "practices unduly delaying an employee's acquisition of a right to enforce payment of the portion of benefits already accrued." *Alessi*, 451 U.S. at 513. They also restrict the ability of plans to forfeit that right once it is acquired, thereby preventing pension benefits from being forfeited as a sanction "for quitting, for misconduct, or upon discharge." *Pension and Employee Benefit Law*, *supra*, at 121. Section 203(a) provides that an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable (*i.e.*, vested) immediately as they accrue, and also establishes alternative minimum schedules for the vesting of accrued benefits derived from employer contributions. 29 U.S.C. 1053(a)(1) and (2); 26 U.S.C. 411(a)(1) and (2). Section 203(a) also requires a pension plan to provide that a participant must have a right to receive his normal retirement benefit

when he attains normal retirement age, 29 U.S.C. 1053(a); see also 26 U.S.C. 411(a), which typically is 65 years of age. 29 U.S.C. 1002(24); 26 U.S.C. 411(a)(8). ERISA contains no analogous rules regarding the vesting of early retirement benefits. Thus, many plans provide for early retirement benefits that are subject to various conditions, such as service conditions that exceed the normal service conditions for vesting of the accrued benefit, age conditions, and a wide range of contingencies.

Section 203(a)(3) sets forth several exceptions to these general rules of nonforfeitability. These exceptions provide that a participant's "right to an accrued benefit" derived from employer contributions "shall not be treated as forfeitable" solely because the plan provides that the benefit is not payable or the payment of benefits is suspended or reduced in specified circumstances. See 29 U.S.C. 1053(a)(3). The exception at issue here, Section 203(a)(3)(B), provides that a right to accrued benefits derived from employer contributions shall not be treated as forfeitable if the plan provides that "the payment of benefits is suspended for such period as the [participant] is employed, subsequent to the commencement of payments of such benefits," during periods of specified employment.[3] 29 U.S.C. 1053(a)(3)(B). For single-employer plans, disqualifying employment is limited to reemployment for the same company. For multi-

[3] In addition to authorizing suspension of benefit payments during periods of disqualifying employment, Section 203(a)(3) also provides that a right to an accrued benefit shall not be treated as forfeitable if benefits are not paid: (1) because of the participant's death (29 U.S.C. 1053(a)(3)(A)); (2) because of a retroactive plan amendment on account of substantial business hardship (29 U.S.C. 1053(a)(3)(C)); (3) because of the participant's withdrawal of his mandatory employee contributions from a plan that provides for such contributions (29 U.S.C. 1053(a)(3)(D)); or (4) because the plan is amended to reduce benefits or payment of benefits is suspended under 29 U.S.C. 1426 and 1441 as part of the termination of a multiemployer plan (29 U.S.C. 1053(a)(3)(F)); see also 26 U.S.C. 411(a)(3).

employer plans of the sort at issue here, receipt of benefit payments may be conditioned on the participant's refraining from employment "in the same industry, in the same trade or craft, and the same geographic area covered by the plan." 29 U.S.C. 1053(a)(3)(B)(ii). Section 203(a)(3)(B) authorizes the Secretary of Labor to prescribe such regulations as may be necessary to carry out its purposes.

2. The language and structure of ERISA show that Congress did not consider the temporary suspension of benefit payments authorized by Section 203(a)(3) to constitute a "decrease" or "reduction" in the participant's accrued benefits under the plan, which will once again be paid to him if he leaves disqualifying employment. Those provisions likewise show that a plan amendment permitting such a suspension of payments does not reduce the participant's benefits in violation of Section 204(g).

a. The language of ERISA consistently distinguishes between a "reduction of benefits" and a "suspension of benefit payments." See, *e.g.*, 29 U.S.C. 1341a(d) (plan sponsor of terminated plan "shall *reduce benefits* and *suspend benefit payments* in accordance with [29 U.S.C.] 1441") (emphasis added); 29 U.S.C. 1342(d)(1)(A)(v) (providing trustee appointed to terminate plan with power "in the case of a multiemployer plan, *to reduce benefits* or *suspend benefit payments* under the plan") (emphasis added). Several provisions also specifically distinguish between an authorized suspension of benefit payments and amendments undertaken to reduce benefits. Indeed, one such provision appears in Section 203(a) itself. See 29 U.S.C. 1053(a)(3)(E)(ii) (stating that a participant's right to an accrued benefit under a multiemployer plan shall not be treated as forfeitable solely because "the plan is amended to *reduce benefits* under section 1425 or 1441 of this title, or * * * *benefit payments* under the plan may be *suspended* under section 1426 or 1441 of this title") (emphasis added); see also 29 U.S.C. 1441(a)

(providing that in certain situations involving terminated benefit plans, the plan sponsor "shall *amend the plan to reduce benefits*, and shall *suspend benefit payments*, as required by this section") (emphasis added); 26 U.S.C. 411(a)(3)(F). The text of ERISA thus reflects that Congress drew a distinction between a reduction of a participant's benefits as calculated under the rules of the plan and an authorized suspension of benefit *payments* to a participant and treated them differently. Cf. *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 8 (1987) ("The words 'benefit' and 'plan' are used separately throughout ERISA, and nowhere in the statute are they treated as the equivalent of one another. Given the basic difference between a 'benefit' and a 'plan,' Congress' choice of language is significant in its pre-emption of only the latter.").

The court of appeals found this textual distinction insignificant. In its view, although the words had distinct meanings in some applications, that did not mean that a plan amendment permitting suspensions of benefit payments would not "reduce benefits" within the meaning of Section 204(g). Pet. App. 12a-14a; see also Br. in Opp. 16. However, there is nothing in the text of ERISA to suggest that an amendment respecting authorized suspension of benefit payments is to be treated as a reduction of accrued benefits within the meaning of Section 204(g). Indeed, the only provision of ERISA of which we are aware that speaks of suspension of benefit payments having the effect of a reduction does not speak of a reduction of *benefits*—the language used by 204(g)(2)—but a reduction of "the sum of *such payments*." 29 U.S.C. 1441(d)(1) (emphasis added); see also 26 U.S.C. 418E(a) (payments shall be suspended "to the extent necessary to reduce *the sum of such payments* and *the payments of such basic benefits*") (emphasis added).

b. This distinction ERISA draws between reductions in benefits and suspension of benefit payments is not merely a

semantic one. In this case, for example, it reflects the special purposes served by the suspension of benefit payments permitted by Section 203(a)(3)(B). Congress expressly authorized the suspension of benefit payments during periods of reemployment to prevent "double-dipping" through post-retirement employment in the same industry, trade or craft, and geographic area. As Congress clearly recognized, such "double-dipping" disadvantages the employees who must continue to fund the benefits of retirees, while competing with them for the same wages; indeed, retirees may be able to undercut active employees because they can afford to work at lower salaries because of their pension income. See, *e.g.*, 3 Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 4376 (Comm. Print 1976) (*ERISA Leg. Hist.*) (statement of Sen. Williams); *id.* at 4772 (statement of Sen. Javits); see also *Smith* v. *CMTA-IAM Pension Trust*, 654 F.2d 650, 658 n.9 (9th Cir. 1981). Double-dipping also diverts plan resources from those who have fully retired to those who continue to earn income by working. Cf. *Alessi*, 451 U.S. at 514 (noting that offsetting payments to a participant also receiving Social Security benefits "would advantage all participants [and] * * * would permit a higher average pension payout for each participant"). To permit plans to prevent double-dipping, Congress specifically provided that they may suspend benefit payments during periods of disqualifying employment without the suspension constituting a prohibited forfeiture of the benefits the participant has accrued under the plan. Moreover, the congressional debates preceding enactment of ERISA evinced a desire that "a plan's provisions concerning suspension [could] take into account" various factors about industrial conditions that necessarily are not static: "the particular facts and circumstances of the industry; the

objectives of industrial stability; [and] the conditions of employment and earnings in the industry." 3 *ERISA Leg. Hist.* 4669 (statement of Rep. Dent). These considerations suggest that Congress envisioned that suspension provisions would be subject to amendment.

c. In addition, the language Congress chose in Section 203(a)(3)(B) and Section 204(g) reflects two fundamental differences between a "suspension of benefit payments" and a "reduction of benefits." First, a "suspension"—like the suspension at issue here—ordinarily is temporary (see *Webster's Third New International Dictionary* 2303 (1993) ("temporary withholding")), while a "reduction" has no such temporal limitation and is typically permanent or of indefinite duration. See *id.* at 1905. The court of appeals considered the temporary suspension at issue here to be a permanent reduction only because it overlooked the second fundamental difference—that between an "accrued benefit" and a "benefit *payment*"—and thus erroneously held that the temporary suspension "reduce[d] the participant's total early retirement benefits by an amount determined by how long the disqualifying work continues."[4] Pet. App. 10a.

[4] The court of appeals also erred to the extent it held that respondents had lost the "right" to continue to work in the construction industry while receiving retirement payments from that industry. Pet. App. 10a. To begin with, such a "right" would not be within the scope of benefits ERISA was designed to regulate or the ordinary understanding of ERISA benefits. See 29 U.S.C. 1002(2)(A) (stating that an "employee pension benefit plan" is designed to "provide[] retirement income to employees"), 1002(23) (defining "accrued benefit"). In any event, respondents lacked a statutorily protected right to receive such payments while working, for the plan retained the right to amend its "disqualifying employment" provision in the manner authorized by Section 203(a)(3)(B). See J.A. 37. Since the plan's amendment provision authorizes the plan to adopt a "disqualifying employment" provision under which "the payment of benefits is suspended" during periods of specified post-retirement employment, the adoption of such a provision does not result in the loss of any legally cognizable "right" to work in disqualifying employment while receiving benefits or the loss (or reduction) of an "accrued" benefit.

Contrary to the court of appeals' belief, a participant's "accrued benefit" under a plan is not defined as the total sum of the payments he or she actually receives over the course of retirement. Rather, a participant's "accrued benefit" represents his available entitlement under the plan (ordinarily based on the participant's years of service and compensation history), which is typically expressed in terms of a defined level of periodic payments at normal retirement age. See 29 U.S.C. 1002(23) (defining "accrued benefit" as "the individual's accrued benefit determined under the plan and * * * expressed in the form of an annual benefit commencing at normal retirement age"); see also *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 440 (1999) (describing "accrued benefits" as "a right to a certain defined level of benefits"); cf. *Mead Corp.* v. *Tilley*, 490 U.S. 714, 717 (1989) (stating that a defined benefit plan provides "a fixed level of benefits").

d. When Congress amended Section 204(g) as part of the REA to make clear that the provision applies to early retirement benefits, it did so by prohibiting plan amendments having the effect of eliminating or reducing an early retirement "benefit" (rather than "accrued benefit"), see REA § 301(a), 98 Stat. 1451; 29 U.S.C. 1054(g)(2). That difference in terminology, however, reflects no difference in substance, because the amendment was simply added to address uncertainty about whether early retirement benefits *are* accrued benefits. See pp. 20-21, *infra*. And Congress explicitly equated "benefits" and "accrued benefits" for these purposes by providing that an amendment that has the effect of reducing an early retirement benefit will be treated as reducing "accrued benefits." 29 U.S.C. 1054(g)(2). The amendment thus did not expand the basic scope of what Section 204(g) protects. Cf. *Bellas* v. *CBS, Inc.*, 221 F.3d 517, 523 (3d Cir. 2000) (while "Congress did modify section 204(g) in [the REA] to the end that early retirement benefits

and retirement-type subsidies were defined as being accrued for purposes of ERISA's anti-cutback provisions," "the definition of an accrued benefit has not been modified").

e. A benefit payment is a single periodic (typically monthly) payment. The nonreceipt of periodic payments because of a suspension authorized by Section 203(a)(3)(B) does not result in a "reduction of benefit" if the participant's entitlement to "a certain defined level of benefits" (*Hughes Aircraft*, 525 U.S. at 440) remains the same under the plan.[5] Under that understanding, suspension of respondents' benefit payments pursuant to Section 203(a)(3)(B) does not reduce their benefits. As soon as respondents cease their disqualifying employment—either by fully retiring, by entering a different industry or trade, or by leaving central Illinois —their pension payments will resume at precisely the same defined level as before.[6]

3. The text of Section 203 itself confirms that suspension of benefit payments during periods of disqualifying employment does not reduce a participant's accrued benefit—and that an amendment permitting such suspensions does not do so either. Although the suspension of benefit payments during periods of disqualifying employment results in the

[5] Thus, for example, if two participants of the same age and compensation history had the same years of service with a company, and therefore had the same "accrued benefit," their "benefits" would be considered the same although one had had payment of benefits suspended during several months of disqualifying employment. By the same token, the two employees would have the same "benefits" if one employee died shortly after retirement and ceased receiving payments and the other lived for thirty years after retirement.

[6] Indeed, if the pension plan at issue here involved sufficient employee contributions, instead of exclusively employer contributions, the benefit payments would increase slightly. Because the participant retains an absolute entitlement to recover his own contributions, see 29 U.S.C. 1053(a)(1), future payments would have to be increased to offset any loss of payments derived from his own contributions during the period of suspension.

plan "permanently withhold[ing]" payments that otherwise would have been made during those months, I.R.S. Notice 82-23, 1982-2 C.B. 752; accord 29 C.F.R. 2530.203-3(d)(1) (payment is "withheld permanently"), Section 203(a)(3)(B) explicitly provides that the loss of those payments because of disqualifying employment will not be deemed to effect a forfeiture of a participant's "right to an accrued benefit" (29 U.S.C. 1053(a)(3)(B)). Thus, Section 203(a)(3)(B) treats the "accrued benefit" as remaining constant, and identifies the potential issues resulting from a suspension of payments as one of forfeiture of the right to that accrued benefit. Thus, the text of Section 203(a)(3)(B) itself establishes that a participant's accrued benefit is not reduced by a suspension of benefit payments during periods of disqualifying employment. It follows that "an amendment authorizing such a suspension does not serve to decrease a participant's accrued benefits, and thus cannot violate [Section 204(g)]." *Spacek*, 134 F.3d at 291; accord Pet. App. 30a (Cudahy, J., dissenting) ("To change the rules governing suspensions is merely to create a suspension with a little different design than an earlier one. The rules addressing the consequences of invoking a suspension necessarily encompass changes leading to a new form of suspension."). And because an amendment expanding the types of disqualifying employment under a suspension provision consistent with Section 203(a)(3)(B) would not violate the anti-cutback rule of Section 204(g) if it were applied to suspend fully accrued normal retirement benefits, it would not violate the rule if similarly applied to early retirement benefits.[7] As set forth more fully below,

[7] Respondents contend that under this reading of ERISA, "a plan would be entitled to promulgate an amendment 'suspending' *all* early retirement benefits for 18 months, *without violating the cutback rule*." Br. in Opp. 15. Respondents' concerns about a lack of protection against such an amendment are unfounded. ERISA and its implementing regulations explicitly authorize suspension of benefit payments under only

giving early retirement benefits *greater* protection than normal retirement benefits would be contrary to Congress's plain intent in enacting the REA.

Moreover, Section 203 contains its own prohibition on certain types of plan amendments that affect benefit *vesting* that parallels the protection of Section 204(g) for benefit *accrual*. Section 203(c) prohibits plan amendments that alter vesting schedules and that have the effect of reducing participants' nonforfeitable percentage of accrued benefits, unless the amendment gives participants the option of having their nonforfeitable percentage calculated under the pre-amendment vesting schedule. See 29 U.S.C. 1053(c)(1)(A) and (B). Because Section 203 contains its own limitation on plan amendments—which does not apply to amendments providing for suspension of payments as permitted by Section 203(a)(3)(B)—there is particular reason to conclude that amendments involving suspension-of-payment provisions are not governed by a separate limitation on plan amendments contained in another section of ERISA addressing the distinct subject of the *accrual* of benefits.

B. The Legislative History of the Retirement Equity Act of 1984 Confirms That Congress Did Not Intend Section 204(g) To Prohibit Amendments To Disqualifying Employment Provisions

Under ERISA as originally enacted, it was uncertain whether early retirement benefits were "accrued benefits." See, *e.g.*, *Amato* v. *Western Union Int'l*, 773 F.2d 1402, 1407, 1414 (2d Cir. 1985) (holding that early retirement benefits are "accrued" for purposes of anti-cutback rule); *Bencivenga* v. *Western Pa. Teamsters & Employers Pension Fund*, 763 F.2d 574, 577-578 (3d Cir. 1985) ("Case law also supports the

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two circumstances—during periods of disqualifying employment and during plan termination or insolvency. See, *e.g.*, 29 U.S.C. 1426, 1441; 26 U.S.C. 418E(a); 29 C.F.R. 2530.203-3.

conclusion that early retirement benefits are not accrued benefits under ERISA."). It was also unclear, therefore, whether Section 204(g) as originally enacted prevented plans from decreasing early retirement benefits. See *Pension and Employee Benefit Law*, *supra*, at 164. In 1984, Congress enacted the Retirement Equity Act, which made clear that early retirement benefits are protected by Section 204(g) against reduction by plan amendment. See REA § 301, 98 Stat. 1451. The REA added language to both ERISA Section 204(g) and its Internal Revenue Code counterpart (26 U.S. 411(d)(6)) providing that a plan amendment that has the "effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy * * * with respect to benefits attributable to service before the amendment *shall be treated as reducing accrued benefits.*" 29 U.S.C. 1054(g)(2) (emphasis added); see also 26 U.S.C. 411(d)(6)(B).

As the language of the provision itself indicates, the amendment was enacted for the purpose of affording early retirement benefits "the same form of protection from reduction by amendment accorded to accrued benefits." *Spacek*, 134 F.3d at 291. The Committee Reports emphasized that the new language of Section 204(g)(2) merely "clarifies the scope of the prohibition against [benefit] decreases" and "would not affect the application of any other provision of the Code." S. Rep. No. 575, 98th Cong., 2d Sess. 28 (1984); accord H.R. Rep. No. 655, 98th Cong., 2d Sess. 25-26 (1984) (stating that Section 204(g)(2) "codifies present law"). Nothing in the REA suggests an intent to intrude upon the nonforfeitability rules and exceptions that Congress had already established in Section 203, or to depart from the understanding that a suspension of benefit *payments* pursuant to a plan provision authorized by Section 203(a)(3)(B) does not result in a decrease of accrued *benefits*. As the *Spacek* court concluded, because the amendment of a disqualifying-employment provision of a plan permitted by

Section 203(a)(3)(B) does not abridge the "accrued benefits" of plan participants with respect to normal retirement benefits, "then it also cannot violate [Section 204(g)] if applied to early retirement benefits." 134 F.3d at 291.

Representative William Clay, the "principal sponsor" (130 Cong. Rec. 23,488 (1984)) of the House bill that embodied the amendment to Section 204(g), made this point clear during the congressional debates (*id.* at 23,487 (emphasis added)):

> I wish to further clarify the anti cutback provisions of Section 301 of the bill. Those provisions are not intended to apply to benefit changes authorized by existing law. * * * *Nor do those provisions in any way apply to or affect the provisions of ERISA section 203(a)(3)(B)* and [Internal Revenue C]ode section 411(a)(3)(B) relating to the suspension of benefits for postretirement employment, including the authorization for multiemployer plans to adopt stricter rules for the suspension of subsidized early retirement benefits.

As the court emphasized in *Spacek*, Representative Clay's statement indicates that Section 203(a)(3)(B) of ERISA "authorizes the very type of [plan] amendment at issue in this case [for employees who retire under a qualified plan], and * * * [Section 204(g)] in no way limits this authorization." 134 F.3d at 290.

The court of appeals found Representative Clay's remarks to be "ambiguous at best" (Pet. App. 16a) and discounted them because it could identify no other support in the legislative history for Representative Clay's explanation of the amendment. *Ibid.* As the dissent below correctly observed, however, the "effort of the majority to explain away this comment is unconvincing" (*id.* at 26a), because the "legislative history * * * fits so closely with the interpretation founded on plain meaning." *Ibid.* Respondents likewise err in contending (Br. in Opp. 18) that Representative Clay's

statements "merely stressed * * * that REA did not alter Section 203's distinction between what forms of suspensions may be promulgated for 'normal' retirement benefits as compared to early-retirement benefits." There would have been no need for Representative Clay to make a statement having the meaning that respondents attribute to it. By its own terms, Section 204(g)(2) applies only to "plan amendment[s]" (29 U.S.C. 1054(g)(2)), and would have no application to an unamended suspension provision of a plan that differentiated between suspension of normal retirement benefits and early retirement benefits.

C. The Department Of The Treasury Has Long Taken The Position That A Suspension Of Benefit Payments Authorized By Section 203(a)(3)(B) Does Not Reduce Benefits, And That Application Of Amended Suspension-Of-Payment Provisions To Benefits Attributable To Service Prior To The Amendment Does Not Violate Section 204(g)

1. More than two decades of regulatory practice supports the conclusion that application of amended suspension-of-payment provisions to current retirees and existing accruals does not violate the anti-cutback rule. Since 1977, the Department of the Treasury has taken the position in formal regulations that "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under [ERISA] § 203(a)(3)(B)." 42 Fed. Reg. 42,318, 42,339 (1977); 26 C.F.R. 1.411(c)-1(f).[8]

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[8] Although this regulation is codified in Title 26 of the Code of Federal Regulations, the Department of the Treasury has made clear that its regulations implementing the Internal Revenue Code provisions of ERISA also apply to the corresponding sections in Title I of ERISA. See, *e.g.*, 53 Fed. Reg. 26,050, 26,053 (1988) ("The regulations under section 411 are also applicable to provisions of Title I [of ERISA]."); see also 65 Fed. Reg. 53,901, 53,902 (2000) ("Treasury regulations issued under section 411(d)(6)(B) of the Code apply as well for purposes of Section 204(g)(2) of

Accord T.D. 7501, 1977 WL 52383 (Apr. 25, 1977) (explaining the addition of paragraph (f)); Rev. Rul. 81-140, 1981-1 C.B. 180 (stating that when a retiree is employed "in section 203(a)(3)(B) service, the nonforfeitability requirements are not violated even though actuarial adjustments to the employee's accrued benefit in a defined benefit plan are not made"). The Department has explained that no such adjustment is required in the case of suspensions of benefit payments under Section 203(a)(3)(B) because under the text of ERISA, "a plan may permanently withhold a participant's pension payment (without a prohibited forfeiture [of benefits] resulting) for any month in which the participant is employed in 'section 203(a)(3)(B) service.'" I.R.S. Notice 82-23, *supra*; accord IR-82-139, 1982 WL 210486 (Dec. 3, 1982). As the Fifth Circuit correctly concluded in *Spacek*, "because the reduction in total benefits paid over the lifetime of the plan participant as a result of the suspension need not be accounted for actuarially in computing the participant's accrued benefit under [29 U.S.C.] § 1054(c)(3)," an amendment authorizing such a suspension "does not serve to decrease the participant's accrued benefits, and thus cannot violate [Section 204(g)]." 134 F.3d at 291.

The court of appeals majority found that Treasury regulation unpersuasive. See Pet. App. 17a-21a. In the court's view, it is "irrelevant" (*id.* at 19a) that suspension of normal retirement benefit payments during periods of disqualifying employment is not deemed to affect accrued benefits, because under Section 204(g)(2), amendments that have the effect of reducing early retirement benefits shall "be *treated* as reducing accrued benefits." *Id.* at 18a; see also Br. in Opp. 18-19. The court erred. First, the court failed to appreciate the import of the regulation, which is that because the mere

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ERISA."). See generally Reorganization Plan No. 4 of 1978, § 101, 92 Stat. 3790.

suspension of benefit payments is not deemed to cause a reduction in the accrued benefit of a participant under the plan, an amendment permitting such a suspension would not result in a "reduction." Congress presumably was aware of this regulation when it enacted the REA in 1984, and expected that a suspension of early retirement benefit payments would no more constitute a reduction in such "benefits" than a suspension of normal retirement benefit payments would result in a decrease in "accrued benefits." Cf. *Boeing Corp.* v. *United States*, 537 U.S. 437, 457 (2003) (Congress's failure to reject interpretation of statute set forth in regulations during subsequent enactments "is persuasive evidence that Congress regarded that regulation as a correct implementation of its intent."); *Alessi*, 451 U.S. at 519 (noting that "when it enacted ERISA, Congress knew of the IRS rulings permitting integration and left them in effect"). Second, the court of appeals' reading would have the perverse result of giving early retirement benefits protection under Section 204(g) superior to that granted normal retirement benefits, contrary to Congress's clear intent of merely extending them equivalent protection.

2. In addition, the Department of the Treasury's practice for nearly twenty years has reflected its view that plan amendments that introduce suspension provisions or expand the scope of disqualifying post-retirement employment under Section 203(a)(3)(B) can be applied to benefits attributable to service prior to the amendment. The Internal Revenue Service (Service) periodically publishes a Listing of Required Modifications (LRM) setting forth "samples of plan provisions that have been found to satisfy certain specific requirements of the Internal Revenue Code," so as "to assist sponsors [of pension plans] who are drafting or redrafting plans to conform to applicable law and regulations." *Defined Benefit Listing of Required Modifications and Information Package* cover page (2000)

<http://www.irs.gov/pub/irs-tege/db_lrm.pdf>. Since at least 1984, the Service has explicitly stated in its LRMs that existing plans may adopt a suspension-of-payment provision under Section 203(a)(3)(B), without indicating that such an amendment must be limited to new plans or new accruals. See, *e.g.*, *id.* at 111; *Defined Benefit Listing of Required Modifications and Information Package* 44-46 (1987); *Defined Benefit Listing of Required Modifications and Information Package* 44-45 (1984). The Service reports that during that period, it has consistently approved plan amendments that introduced suspension provisions or expanded the scope of disqualifying employment without requiring the plans to apply those provisions to new accruals only.

More recently, and after notice and comment, the Internal Revenue Service incorporated its longstanding view into its Multiemployer Plan Examination Guidelines, a manual that sets forth technical guidance for Service field personnel. The Guidelines state that "[a]n amendment that reduces IRC 411(d)(6) protected benefits on account of [Section] 203(a)(3)(B) service does not violate IRC 411(d)(6)." Multiemployer Plan Examination Guidelines 4.72.14.3.5.3(7) (2001) (available on WESTLAW, RIA-IRM database). This position is entitled to deference as the considered judgment of the agency charged with administering and implementing both Section 204(g), its Code counterpart, 26 U.S.C. 411(d)(6), and most of the other accrual and vesting provisions of ERISA, based on its long experience and confirmed after public notice and comment. The "'well-reasoned views' of an expert administrator rest on 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Alaska Dep't of Envtl. Conservation* v. *EPA*, No. 02-658 (Jan. 21, 2004), slip op. 21 (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 642 (1998)); *id.* at 22 ("Cogent 'administrative interpretations . . . not [the] products of formal rulemaking . . . neverthe-

less warrant respect.") (quoting *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003)) (alterations in original). Such views warrant "serious consideration" because of the agency's "unique advantages" stemming from its "day-to-day efforts to implement its statutory mission." 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 334 (4th ed. 2002).

3. The court of appeals erred (Pet. App. 21a) in concluding that a Treasury regulation implementing the Internal Revenue Code counterpart of the anti-cutback rule (26 U.S.C. 411(d)(6)) supports its conclusion in this case. That regulation specifies that a plan may not be amended to add new conditions that restrict the availability of a "section 411(d)(6) protected benefit that has already accrued." 26 C.F.R. 1.411(d)-4 Q&A-7. By its own terms, however, that regulation has no relevance to plan amendments that provide for suspension of benefit payments in accordance with Section 203(a)(3)(B). Because a participant does not have a right to be free from a post-retirement employment-disqualification provision that (as in this case) conforms to Section 203(a)(3)(B), he is not "protected" against the resulting suspension of benefit payments. The regulation on which the court of appeals relied therefore is simply inapplicable to this case. Moreover, the Service does not construe this regulation to prohibit plan amendments permitting suspension of benefit payments under Section 203(a)(3)(B), but rather, as explained above, has explicitly concluded that amendments permitting suspension of payments "on account of 203(a)(3)(B) service does not violate [the anti-cutback rule]." Multiemployer Plan Examination Guidelines 4.72.14.3.5.3(7). Cf. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations.").

D. The Court Of Appeals' Rule Would Create Unwarranted Administrative Burdens And Harm Plan Participants

Because plan investments, retirement rates, and industry conditions are not static, trustees of multiemployer pension plans historically have been permitted to revise the terms of disqualifying-employment provisions to promote industrial stability and the actuarial soundness of pension plans. See Br. Amicus Curiae for Nat'l Coord. Comm. for Multiemployer Plans at Pet. Stage (NCCMP Cert. Amicus Br.) 2-3, 9-12. Thus, for example, plans have amended the definition of "disqualifying employment" to relax restrictions on reemployment when unemployment rates in an industry are low to encourage retirees to return to the workforce, and to reinstate more restrictive suspension provisions during economic downturns, when active workers are having difficulty finding employment and plan investments are performing more poorly. The traditional flexibility to make such adjustments has permitted plan trustees better to control the financial soundness of the plan on whose solvency all participants depend, in the face of underperforming plan investments or reductions in plan funding stemming from declining employment. Plan boards of trustees—which under federal law must be composed equally of representatives of labor and management, see 29 U.S.C. 186(c)(5)(B)—are well situated to evaluate current circumstances and tailor plan amendments to address them fairly.[9] See generally NCCMP Cert. Amicus Br. 5-6.

[9] The court of appeals suggested (Pet. App. 11a n.6) there was no need for such flexibility, saying that Congress afforded plans all the relief necessary by permitting plan amendments that reduce accrued benefits in the case of "substantial business hardship." 29 U.S.C. 1082(c)(2); see 29 U.S.C. 1054(g)(1). However, amendments are possible under the "substantial business hardship" provision only when the plan is on the verge of insolvency. See 29 U.S.C. 1083(b)(4). There is no reason to believe that Congress intended to reserve the flexibility to use a mechanism with relatively mild effects on retirees who *necessarily are currently employed* for situations in which there is a prospect that a multiemployer plan will fail and adversely affect tens of thousands of employees and retirees.

The court of appeals' construction of Section 204(g) would impose unjustified burdens on both multiemployer plan participants and administrators by eliminating plans' long-standing flexibility to adjust reemployment restrictions in light of local economic conditions and the state of plan finances. Affirmance of the court of appeals' decision would have the effect of locking current reemployment restrictions in place for all benefits attributable to service prior to the amendment, and would on balance divert plan resources away from future retirees and persons who have fully retired in favor of current retirees who are still earning income by working within the same industry. The diversion of resources is particularly difficult to justify where, as here, participants essentially have "retired" into a job promotion, moving from employment as a construction worker into a supervisory position. Furthermore, because the court of appeals' rule essentially would prohibit changes that affected already accrued benefits (regardless of whether the participant had already retired), see Pet. App. 10a n.6, it would be extremely burdensome for pension plans that *do* amend their suspension provisions to track which suspension provisions apply to which accruals.

A holding that plans lack the flexibility to apply an amendment to suspension provisions to benefits of current retirees and other benefits attributable to service prior to the amendment would in the long run disadvantage workers, because plans would have incentives to adopt the most restrictive reemployment conditions at the outset to avoid administrative burdens and potentially crippling outlays. As this Court noted in the related context of employee welfare benefit plans, "[g]iving [funds] th[e] flexibility [to amend

their plans] also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, 'they would err initially on the side of omission.'" *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 515 (1997) (quoting *Heath* v. *Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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